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No. 03-929

In the Supreme Court of the United States

JOHN A. RAPANOS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether wetlands that are adjacent to, and have a surface hydrological connection with, a drain that flows into a creek before reaching traditional navigable waters are part of "the waters of the United States" within the meaning of the Clean Water Act, 33 U.S.C. 1362(7).

2. Whether application of the Clean Water Act to the wetlands at issue in this case is a permissible exercise of congressional authority under the Commerce Clause.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is reported at 339 F.3d 447. Earlier opinions of the court of appeals are reported at 235 F.3d 256 and 115 F.3d 367. The opinion of the district court (Pet. App. B1-B12) is reported at 190 F. Supp. 2d 1011. An earlier opinion of the district court is reported at 895 F. Supp. 165.

JURISDICTION

The judgment of the court of appeals was entered on August 5, 2003. A petition for rehearing was denied on September 29, 2003 (Pet. App. D1). The petition for a writ of certiorari was filed on December 22, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted on two counts of knowingly discharging pollutants into waters of the United States without a permit, in violation of Section 301(a) of the Federal Water Pollution Control Act Amendments of 1972 (Clean Water Act or CWA), 33 U.S.C. 1311(a). He was sentenced to three years of probation and fined $185,100. Petitioner appealed the convictions, and the government cross-appealed the sentence. The court of appeals affirmed the convictions and remanded to the district court for resentencing. On June 18, 2001, this Court granted certiorari, vacated the judgment of the court of appeals, and remanded the case for further consideration in light of the Court's intervening decision in *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*). Pet. App. C1.

On remand, the district court set aside the convictions and dismissed the charges. Pet. App. B1-B12. The court of appeals reversed that ruling and reinstated petitioner's convictions. *Id.* at A1-A12. In light of its decision on the prior appeal, the court also remanded for resentencing. *Id.* at A12.

1. Section 301(a) of the Clean Water Act prohibits the "discharge of any pollutant by any person," unless in compliance with the Act. 33 U.S.C. 1311(a). A person who "knowingly" violates that prohibition is subject to potential felony penalties. 33 U.S.C. 1319(c)(2)(A). "Discharge of a pollutant" is defined to include "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. 1362(12)(A). The CWA defines the term "navigable waters" to mean "the waters of the

United States, including the territorial seas." 33 U.S.C. 1362(7).

This Court has recognized that Congress, in enacting the CWA, "evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985); see *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 486 n.6 (1987) ("While the Act purports to regulate only 'navigable waters,' this term has been construed expansively to cover waters that are not navigable in the traditional sense.").[1] In *Riverside Bayview*, the Court upheld the assertion by the United States Army Corps of Engineers (Corps) of regulatory authority, under the CWA, over "all wetlands adjacent to other bodies of water over which the Corps has jurisdiction." 474 U.S. at 135.

In *SWANCC*, this Court again construed the CWA term "waters of the United States." The Court in *SWANCC* held that use of "isolated" nonnavigable intrastate waters by migratory birds was not a sufficient basis for the exercise of federal regulatory jurisdiction under the CWA. 531 U.S. at 166-174. The Court noted, and did not cast doubt upon, its prior holding in *Riverside Bayview* that the CWA's coverage extends beyond

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[1] To avoid confusion between the term "navigable waters" as defined in the CWA and implementing regulations, see 33 U.S.C. 1362 and 33 C.F.R. 328.3, and the traditional use of the term "navigable waters" to describe waters that are, have been, or could be used for interstate or foreign commerce, see 33 C.F.R. 328.3(a)(1), this brief will refer to the latter as "traditional navigable waters."

waters that are "navigable" in the traditional sense. See *id.* at 172. The Court stated, however, that "it is one thing to give a word limited effect and quite another to give it no effect whatever. The term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *Ibid.*

2. The CWA sets up two complementary permitting schemes. Section 404(a) authorizes the Secretary of the Army, acting through the Corps, or a State with an approved program, to issue a permit "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. 1344(a). At all times relevant to this case, the State of Michigan had an approved Section 404 permit program covering the waters at issue. See 40 C.F.R. 233.70. Under Section 402, any discharge of pollutants other than dredged or fill material must be authorized by a permit issued by the United States Environmental Protection Agency (EPA) (or a State with an approved program) under the National Pollutant Discharge Elimination System (NPDES). See 33 U.S.C. 1342. The Corps and EPA share responsibility for implementing and enforcing Section 404 of the CWA. See, *e.g.*, 33 U.S.C. 1344(b) and (c).

The Corps and EPA have promulgated identical regulatory definitions of "waters of the United States." See 33 C.F.R. 328.3(a) (Corps definition); 40 C.F.R. 230.3(s) (EPA definition). The definition, as it relates to this case, encompasses, *inter alia*, traditional navigable waters, which include tidal waters and waters susceptible to use in interstate commerce, see 33 C.F.R. 328.3(a)(1), 40 C.F.R. 230.3(s)(1); "tributaries" to tradi-

tional navigable waters, see 33 C.F.R. 328.3(a)(5), 40 C.F.R. 230.3(s)(5); and wetlands that are "adjacent" to traditional navigable waters or their tributaries, see 33 C.F.R. 328.3(a)(7), 40 C.F.R. 230.3(s)(7).

3. Petitioner owns a 175-acre parcel of land in Williams Township, Michigan. In 1988, petitioner entered into an option agreement with a developer that contemplated the possible use of the tract as the site of a shopping mall. In order to make the land more suitable for development, and thus more attractive to the optionee, petitioner cleared the heavily-wooded property of trees and shrubs, and he eradicated forested wetlands on the property by filling them with sand. Petitioner carried out those activities despite repeated warnings from his own environmental consultants, from the Michigan Department of Natural Resources, and from the EPA that the property contained wetlands and that the discharge of fill material would require a permit. Pet. App. A2-A3; *United States* v. *Rapanos*, 115 F.3d 367, 368-369 (6th Cir.), cert. denied, 522 U.S. 917 (1997) (*Rapanos II*); *United States* v. *Rapanos*, 235 F.3d 256, 260 (6th Cir. 2000) (*Rapanos III*).

Until its alteration through petitioner's fill activities, the property in question contained at least 29 acres of wetlands. See Pet. App. A3. Those wetlands "are connected to the Labozinski Drain (a one hundred year-old man-made drain) which flows into Hoppler Creek which, in turn, flows into the Kawkawlin River, which is navigable. The Kawkawlin eventually flows into Saginaw Bay and Lake Huron." *Id.* at A2; see Gov't C.A. Br. 10. "During the course of this proceeding, the wetlands in question have been described as between eleven and twenty miles from the nearest navigable-in-fact water." Pet. App. A2.

4. a. On July 27, 1994, a federal grand jury returned a second superseding indictment charging petitioner with two counts of knowingly discharging pollutants into the waters of the United States, in violation of 33 U.S.C. 1311(a) and 1319(c)(2)(A), and two counts of witness tampering, in violation of 18 U.S.C. 1512. See *United States* v. *Rapanos*, 895 F. Supp. 165, 166 (E.D. Mich. 1995), rev'd, 115 F.3d 367 (6th Cir.), cert. denied, 522 U.S. 917 (1997) (*Rapanos I*). The CWA counts alleged that petitioner had knowingly deposited fill material into wetlands without an authorizing permit. *Ibid*; see Pet. App. A3.[2]

On March 7, 1995, the jury found petitioner guilty on both CWA counts. *Rapanos I*, 895 F. Supp. at 166. On August 3, 1995, the district court granted petitioner's motion for a new trial on the ground that the government had improperly cross-examined petitioner about his refusal to consent to warrantless searches of the property by state regulatory officials. *Id.* at 167-170; see Pet. App. A3. The government appealed, and the court of appeals reversed. *Rapanos II*, 115 F.3d at 372-374; see Pet. App. A3. On remand, the district court sentenced petitioner to three years of probation and a fine of $185,100. See *Rapanos III*, 235 F.3d at 258.

b. Petitioner appealed his convictions, and the government cross-appealed the sentence imposed by the district court. On December 15, 2000, the court of appeals affirmed petitioner's convictions and remanded

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[2] The witness tampering counts alleged that petitioner had threatened one of his environmental consultants for the purpose of intimidating him into keeping silent and destroying his records and reports, which had confirmed the presence of extensive wetlands on the property. See Pet. App. A2; *Rapanos II*, 115 F.3d at 368-369. The district court dismissed those counts at the conclusion of the government's case. See *Rapanos I*, 895 F. Supp. at 166.

for resentencing. *Rapanos III*, 235 F.3d at 258-261. With respect to petitioner's appeal, the court stated only that it had "reviewed each of [petitioner's] claims and f[ou]nd that the district court did not err." *Id.* at 258. With respect to the government's cross-appeal, the court of appeals held that the district court had erred in granting two one-level downward departures and a two-level decrease for acceptance of responsibility in determining the applicable sentencing range under the Sentencing Guidelines. *Id.* at 258-261.

c. Three weeks after the court of appeals' ruling in *Rapanos III*, this Court issued its decision in *SWANCC*. Petitioner filed a petition for a writ of certiorari (No. 00-1428), contending that reversal of his convictions was mandated by *SWANCC*. This Court granted the petition, vacated the judgment of the court of appeals, and remanded the case to the Sixth Circuit for further consideration in light of *SWANCC*. Pet. App. C1. The court of appeals in turn remanded the case to the district court. *United States* v. *Rapanos*, 16 Fed. Appx. 345 (6th Cir. 2001) (remanding to district court); see Pet. App. A4.

d. The district court vacated petitioner's convictions and dismissed the indictment. Pet App. B1-B12. Based on the indirect nature of the surface water connection between the relevant wetlands and the Kawkawlin River, *id.* at B7, and on the court's view that "the nearest body of navigable water to [petitioner's] property is roughly twenty linear miles away," *id.* at B8, the district court found, "as a matter of law, that the wetlands on [petitioner's] property were not adjacent to [traditional] navigable waters," *ibid.* The court stated that Congress's use of the term "navigable waters" in the CWA "has the import of showing * * * what Congress intended as its authority for enacting the CWA: 'its

traditional jurisdiction over waters that were or had been navigable in fact or which reasonably could be so made.'" *Id.* at B11 (quoting *SWANCC*, 531 U.S. at 172). From that fact, the district court inferred that "the plain text of the statute mandates that [traditional] navigable waters must be impacted by [petitioner's] activities." *Ibid.* The court found that the government had failed to prove that petitioner's filling activities had actually "affected any navigable waters." *Id.* at B12. The court then concluded that "the wetlands on [petitioner's] property were not directly adjacent to navigable waters, and therefore, the government cannot regulate [petitioner's] property." *Ibid.*

e. The court of appeals reversed the judgment of the district court and reinstated petitioner's convictions. Pet. App. A1-A12. Relying in part on *United States* v. *Deaton*, 332 F.3d 698 (4th Cir. 2003), petition for cert. pending, No. 03-701 (filed Nov. 10, 2003), the court rejected petitioner's contention that the coverage of the CWA is limited to "wetlands directly abutting navigable water." Pet. App. A10; see *id.* at A8-A10. The court of appeals quoted with approval the *Deaton* court's holding that the "nexus between a navigable waterway and its nonnavigable tributaries * * * is sufficient to allow the Corps to determine reasonably that its jurisdiction over the whole tributary system of any navigable waterway is warranted." *Id.* at A9 (quoting *Deaton*, 332 F.3d at 712). The court of appeals concluded that the surface water connection between petitioner's wetlands and traditional navigable waters was a sufficient basis for the exercise of federal regulatory authority under the CWA:

> The evidence presented in this case suffices to show that the wetlands on [petitioner's] land are ad-

> jacent to the Labozinski Drain, especially in view of the hydrological connection between the two. It follows under the analysis in *Deaton*, with which we agree, that [petitioner's] wetlands are covered by the Clean Water Act. Any contamination of [petitioner's] wetlands could affect the Drain, which, in turn could affect navigable-in-fact waters. * * * Because the wetlands are adjacent to the Drain and there exists a hydrological connection among the wetlands, the Drain, and the Kawkawlin River, we find an ample nexus to establish jurisdiction.

Id. at A10 (citation omitted).

Petitioner also contended that, even if the government's views about the scope of the CWA's coverage were found to be correct, he was still entitled to a new trial because the instructions used to define the term "waters of the United States" would have permitted the jury to find him guilty based on the sort of connection to interstate commerce (*e.g.*, use of the wetlands as habitat for migratory birds) that the Court in *SWANCC* found to be an insufficient basis for the exercise of federal regulatory authority under the CWA. The court of appeals rejected that argument. Pet. App. A10-A12. The court observed that petitioner had not objected to the relevant jury instruction but in fact had specifically requested it, and that petitioner therefore could prevail only if he satisfied the requirements governing plain-error review under Federal Rule of Criminal Procedure 52(b). See Pet. App. A11. The court found that the challenged instruction accurately stated the governing law. *Id.* at A11-A12. The court also found "no indication" that any error in the instruction had affected petitioner's "substantial rights." *Id.* at A12. The court explained that, in light of the evidence

upon which the government had relied to establish that petitioner's wetlands were covered by the CWA, "the jury could not have based its decision on impermissible grounds." *Ibid.*

ARGUMENT

1. Petitioner contends (Pet. 8-15) that the court of appeals' construction of the CWA as applying to the wetlands at issue in this case is inconsistent with this Court's decisions in *Riverside Bayview* and *SWANCC*. Petitioner reads those decisions as holding that "only those wetlands that physically abut traditional navigable waters, and are inseparably bound up with those waters, are subject to federal jurisdiction." Pet. 8. That claim lacks merit.

a. The Corps and EPA regulations defining the CWA term "the waters of the United States" have long been premised on the fact that, because "[w]ater moves in hydrologic cycles," pollution of waters that do not themselves meet traditional tests of navigability "will affect the water quality of the other waters within that aquatic system." *Riverside Bayview*, 474 U.S. at 134 (quoting 42 Fed. Reg. 37,128 (1977)); see *Deaton*, 332 F.3d at 707 ("[T]he principle that Congress has the authority to regulate discharges into non-navigable tributaries in order to protect navigable waters has long been applied to the Clean Water Act."); Pet App. A6 ("As common sense makes clear, the Clean Water Act cannot purport to police only the navigable-in-fact waters in the United States in order to keep those waters clean from pollutants."). Exclusion of nonnavigable tributaries and their adjacent wetlands from the coverage of the CWA would subvert Congress's efforts to ensure that the quality of traditional navigable waters is adequately protected. To prevent that result, the

Corps and EPA have reasonably defined the term "waters of the United States" to include wetlands adjacent to tributaries that flow into traditional navigable waters.

b. This Court's decision in *SWANCC* does not cast doubt on the propriety of that regulatory determination. To the contrary, the Court in *SWANCC* quoted with apparent approval its prior holding that "Congress' concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands 'inseparably bound up with the "waters" of the United States.'" 531 U.S. at 167 (quoting *Riverside Bayview*, 474 U.S. at 134). And while the Court in *SWANCC* rejected the Corps' construction of the term "waters of the United States" as encompassing isolated ponds based on their use as habitat for migratory birds, *id.* at 171-172, its reasoning does not cast doubt on the propriety of the assertion of federal regulatory authority here.

The Court in *SWANCC* explained that, if the use of isolated ponds by migratory birds were found to be a sufficient basis for federal regulatory jurisdiction under the CWA, the word "navigable" in the statute would be rendered superfluous. 531 U.S. at 172. While recognizing that the term "navigable waters" as used in the CWA includes "at least some waters that would not be deemed 'navigable' under the classical understanding of that term," *id.* at 171 (quoting *Riverside Bayview*, 474 U.S. at 133), the Court stressed that the word "navigable" must be given some substantive content, see *id.* at 172 ("[I]t is one thing to give a word limited effect and quite another to give it no effect whatever."). The Court concluded that "[t]he term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its tradi-

tional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *Ibid.*

Unlike the Corps' effort in *SWANCC* to regulate "isolated" waters based solely on their use as habitat by migratory birds, the regulation of petitioner's conduct rests squarely on the longstanding authority of the federal government to protect traditional navigable waters. "Any pollutant or fill material that degrades water quality in a tributary of navigable waters has the potential to move downstream and degrade the quality of the navigable waters themselves." *Deaton*, 332 F.3d at 707. Construing the CWA term "waters of the United States" to encompass wetlands adjacent to tributaries that flow into traditional navigable waters thus gives independent content to the term "navigable," and accords with the established understanding of congressional power to regulate and protect traditional navigable waters. See *id.* at 707, 709-710; *Oklahoma ex rel. Phillips* v. *Guy F. Atkinson Co.*, 313 U.S. 508, 525-526 (1941) (Congress may authorize flood control projects on intrastate nonnavigable tributaries in order to prevent flooding in traditional navigable rivers); see also *Headwaters, Inc.* v. *Talent Irrigation Dist.*, 243 F.3d 526, 533-534 (9th Cir. 2001) (upholding CWA jurisdiction over nonnavigable irrigation canals that receive water from, and divert water to, natural streams and lakes). As the court of appeals held, the surface water connection between the wetlands on petitioner's property and the Kawkawlin River (and ultimately Lake Huron) establishes a "significant nexus" between petitioners' wetlands and traditional navigable waters because "[a]ny contamination of [petitioner's] wetlands could affect the [Labozinski] Drain, which, in turn could affect navigable-in-fact waters." Pet. App. A10.

c. Concededly, not every discharge of fill material into "the waters of the United States" (as the Corps and EPA have defined the term) can be expected to have deleterious effects on the quality of traditional navigable waters. That fact, however, does not cast doubt on the propriety of the agencies' adjacent wetlands regulations. As the Court in *Riverside Bayview* explained:

> [I]t may well be that not every adjacent wetland is of great importance to the environment of adjoining bodies of water. But the existence of such cases does not seriously undermine the Corps' decision to define all adjacent wetlands as "waters." * * * That the definition may include some wetlands that are not significantly intertwined with the ecosystem of adjacent waterways is of little moment, for where it appears that a wetland covered by the Corps' definition is in fact lacking in importance to the aquatic environment—or where its importance is outweighed by other values—the Corps may always allow development of the wetland for other uses simply by issuing a permit.

474 U.S. at 135 n.9. Thus, inclusion of petitioner's wetlands within the regulatory definition of "waters of the United States" does not mean that filling of such wetlands is necessarily prohibited. It simply means that the Corps (or, in this case, the Michigan permitting agency, see p. 4, *supra*) will analyze (and attempt to mitigate) the likely impacts of proposed discharges before deciding whether a particular project may go forward. By discharging pollutants into his wetlands without seeking a Section 404 permit, petitioner prevented the state permitting agency from making that determination.

d. Petitioner contends (Pet. 11-12) that the CWA covers only those wetlands that directly abut traditional navigable waters. Petitioner relies (Pet. 11) on this Court's statement in *SWANCC* that jurisdictional authority under the CWA does not "extend[] to ponds that are *not* adjacent to open water." 531 U.S. at 168. Petitioner appears to construe the term "open water," as it appears in the *SWANCC* opinion, to refer solely to traditional navigable waters.

Petitioners' effort to equate the term "open water" with traditional navigable waters is unfounded. When the Court in *SWANCC* referred to ponds "that are *not* adjacent to open water," 531 U.S. at 168, it was alluding to a footnote in *Riverside Bayview* in which the Court had reserved the "question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water, see 33 C.F.R. 323.2(a)(2) and (3) (1985)." *Riverside Bayview*, 474 U.S. at 131-132 n.8 (quoted in *SWANCC*, 531 U.S. at 167-168). When that footnote is read in context, it is clear that the Court in *Riverside Bayview* was reserving the question of jurisdiction over wetlands that are isolated from, rather than adjacent to, any other regulated waters, without regard to those waters' navigability.[3]

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[3] The pertinent footnote in *Riverside Bayview* cited 33 C.F.R. 323.2(a)(2) and (3) (1985), which have since been re-codified at 33 C.F.R. 328.3(a)(2) and (3). Those are the subsections of the regulatory definition of "waters of the United States" that cover interstate and isolated intrastate wetlands, respectively. If, by referring to "wetlands that are not adjacent to bodies of open water," the Court had meant to include wetlands adjacent to nonnavigable tributaries, it would presumably have cited as well 33 C.F.R. 323.2(a)(5) and (a)(7) (1985), which encompass nonnavigable tributaries and wetlands adjacent to those tributaries.

Elsewhere in the *Riverside Bayview* opinion, moreover, the Court used the phrase "open water" as a shorthand for "rivers, streams, and other hydrographic features more conventionally identifiable as 'waters,'" in order to distinguish those types of water bodies from wetland areas, such as "shallows, marshes, mudflats, swamps [and] bogs." *Riverside Bayview*, 474 U.S. at 131-132. The Court did not use the phrase "open water" to distinguish navigable from nonnavigable streams. See, *e.g.*, *id.* at 134 (using the phrase "adjacent bodies of open water" interchangeably with "adjacent lakes, rivers, and streams," without reference to navigability). Finally, under petitioner's interpretation of the term "open water," the CWA would not encompass wetlands adjacent to nonnavigable tributaries, even if those tributaries are themselves part of "the waters of the United States." That view cannot be reconciled with *Riverside Bayview*'s square holding that "a definition of 'waters of the United States' encompassing all wetlands adjacent to other bodies of water over which the Corps has jurisdiction is a permissible interpretation of the Act." *Id.* at 135.

e. Petitioner contends (Pet. 14) that nonnavigable tributaries and their adjacent wetlands need not be treated as part of "the waters of the United States" in order to protect the quality of traditional navigable waters. Petitioner suggests (*ibid.*) that, even under his reading of the CWA, an upstream discharge may provide grounds for civil or criminal liability under the Act if the government can prove that pollutants actually flowed to traditional navigable waters downstream. For at least two reasons, petitioner's proposed approach would provide insufficient protection for traditional navigable waters.

First, Congress is not required to wait until harm to traditional navigable waters actually materializes, but can act to prevent that harm by prohibiting or controlling particular activities in nonnavigable waters upstream. See, *e.g.*, *Oklahoma ex rel. Phillips*, 313 U.S. at 525-528 (Congress has power to control activities in nonnavigable tributaries of traditional navigable waters in order to prevent flooding downstream). Congress's authority to prevent pollutant discharges that will actually degrade the quality of traditional navigable waters necessarily includes the power to devise reasonable procedures for determining, *before* a particular discharge occurs, whether the discharge is likely to have that effect. The Section 404 permitting process serves in part to assist the permitting agency in making that determination. See *Riverside Bayview*, 474 U.S. at 135 n.9 (acknowledging that the Corps' definition of the term "waters of the United States" may encompass "some wetlands that are not significantly intertwined with the ecosystem of adjacent waterways," but finding that prospect to be "of little moment" because the Corps in such circumstances may allow development to go forward simply by issuing a permit); p. 13, *supra*. The regulatory regime would be severely undermined if the exercise of federal authority over a pollutant discharge required proof that harm to traditional navigable waters had *already* occurred.

Second, the harm caused by discharges of dredged or fill material into wetlands is not limited to the potential for sediment to be released downstream. An even greater potential for harm arises from the *filling* of wetlands, which reduces or destroys their capacity to perform a variety of essential hydrological and ecological functions, such as filtering and absorbing pollutants from runoff and storing flood waters. See *Riverside*

Bayview, 474 U.S. at 134-135. Under petitioner's reading of the CWA, however, the Act would do nothing to prevent that harm, since impairment of wetlands' ability to perform those functions does not itself constitute the "discharge" of a pollutant into traditional navigable waters.

f. Petitioner repeatedly describes the wetlands at issue in this case as "isolated" wetlands. See Pet. i, 3, 4, 7, 12, 15, 19, 20, 21, 23, 24, 25. The use of the term "isolated" to describe wetlands that do not directly abut a traditional navigable water, however, has no legal significance. The CWA's coverage extends to wetlands that do not abut traditional navigable waters when those wetlands are adjacent to nonnavigable tributaries of traditional navigable waters. Such wetlands are not truly "isolated" because of the surface hydrological connection to traditional navigable waters. To the extent that petitioner questions the actual existence of a surface water connection between the wetlands on his property and traditional navigable waters, the court of appeals decided this case based on the determination that such a connection exists. See Pet. App. A2, A10. Petitioner's fact-specific disagreement with that assessment of the record does not warrant this Court's review.[4]

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[4] Petitioner states that "the district court found that no hydrological connection was ever established between the wetlands and the nearest [traditional] navigable waterbody." Pet. 12 (emphasis and internal quotation marks omitted). That is incorrect. The district court recognized that "evidence was introduced at trial supporting [the government's] position that the wetlands on [petitioner's] property were connected to navigable waters." Pet. App. B6; see, *e.g.*, 02/01/95 Tr. 175-177 (government's expert testifies, based on analysis of a geological survey map and on his own inspection of the site, that the subject wetlands were

2. Contrary to petitioner's contention (Pet. 15-18), the Sixth Circuit's decision in this case does not squarely conflict with any decision of another court of appeals.

a. Petitioner's reliance (Pet. 16-17) on *Rice* v. *Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001), is misplaced. *Rice* addressed the question whether the Oil Pollution Act of 1990 (OPA), 33 U.S.C. 2701 *et seq.*, imposed liability on parties who discharged oil onto dry ground, where that oil was alleged to have migrated into various types of waters. See *Rice*, 250 F.3d at 265-266. Like the CWA, the OPA regulates discharges into "navigable waters," defined as "the waters of the United States." 33 U.S.C. 2701(21); see 33 U.S.C. 2702(a). The term is generally understood to have the same meaning under both statutes. See *Rice*, 250 F.3d at 267-268.

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connected by surface water to Saginaw Bay). The district court suggested that the instructions given at trial might have permitted the jury to find petitioner guilty even without determining that such a hydrological connection existed. See Pet. App. B6-B7. The court of appeals held, however, that petitioner's challenge to the jury instructions provided no basis for reversal of his convictions because petitioner had affirmatively requested those instructions; the instructions were consistent with the governing law; and any instructional error did not affect petitioner's "substantial rights." *Id.* at A10-A12. Petitioner has not sought review of that holding in this Court. Petitioner suggests in passing that, even if this Court agrees with the Sixth Circuit about the scope of the CWA's coverage, petitioner is nevertheless entitled to a new trial to determine whether a surface water connection actually exists between the relevant wetlands and any traditional navigable water. See Pet. 12 n.2. Petitioner does not explain, however, on what basis he would be entitled to that relief, or why his request for that remedy would warrant this Court's review.

The court in *Rice* rejected each of three suggested bases for the imposition of OPA liability. First, the Fifth Circuit addressed the question whether the OPA regulated "discharges of oil that contaminate the groundwater," and it held that "subsurface waters are not 'waters of the United States' under the OPA." 250 F.3d at 270. Second, the court in *Rice* addressed the plaintiffs' contention that "surface waters on the [property] are directly threatened by [the defendant's] discharges into the groundwater." *Ibid.* The court found that all discharges were onto dry land and that there was no evidence of any discharge directly into surface water. *Ibid.* The court further concluded that, even if the discharges could be shown to have seeped into the surface waters on the ranch, the record was insufficient to support a determination that those waters were part of "the waters of the United States." The court explained that the record in the case contained "no detailed information about how often the creek runs, about how much water flows through it when it runs, *or about whether the creek ever flows directly (above ground) into the Canadian River.*" *Id.* at 270-271 (emphasis added). Absent proof of a surface connection between the creek in question and any traditional navigable water, the court was unable to conclude that the creek was "sufficiently linked to an open body of navigable water as to qualify for protection under the OPA." *Id.* at 271. Third, the court in *Rice* addressed the question whether "discharges into groundwater that migrate into protected surface waters" are covered by the OPA. *Ibid.* The court held that the OPA does not apply to "discharges onto land, with seepage into groundwater, that have only an indirect, remote, and attenuated connection with an identifiable body of 'navigable waters.'" *Id.* at 272.

Thus, the Fifth Circuit's decision in *Rice* was premised on the absence of any demonstrated surface water connection between the allegedly contaminated seasonal creek and any traditional navigable water. The decision therefore does not conflict with the Sixth Circuit's ruling in the instant case, which upheld the exercise of federal regulatory authority under the CWA based on the presence of such a connection.

b. For similar reasons, the Fifth Circuit's decision in *In re Needham*, 354 F.3d 340 (2003), does not squarely conflict with the Sixth Circuit's decision here. *Needham*, like *Rice*, involved a suit under the OPA. See *id.* at 342. The oil at issue in *Needham* "was originally discharged into [a] drainage ditch at Thibodeaux Well," and from there "spilled into Bayou Cutoff, and then into Bayou Folse. Bayou Folse flows directly into the Company Canal, an industrial waterway that eventually flows into the Gulf of Mexico." *Id.* at 343. The Fifth Circuit held that the defendants' conduct was covered by the OPA. *Id.* at 346-347. The court stated that "the proper inquiry is whether Bayou Folse, the site of the farthest traverse of the spill, is navigable-in-fact or adjacent to an open body of navigable water." *Id.* at 346. The Fifth Circuit found that "Bayou Folse is adjacent to an open body of navigable water, namely the Company Canal," *ibid.*; and it concluded on that basis that "the Thibodeaux Well oil spill implicated navigable waters and triggered federal regulatory jurisdiction pursuant to the OPA," *id.* at 347.

In the course of its analysis, the Fifth Circuit appeared to disapprove the results reached by the Sixth and Fourth Circuits in the instant case and *Deaton*, and it stated that "[t]he CWA and the OPA are not so broad as to permit the federal government to impose regulations over 'tributaries' that are neither themselves

navigable nor truly adjacent to navigable waters." 354 F.3d at 345. That statement was dictum, however, in light of the *Needham* court's determination that the oil spill actually involved in that case was covered by the OPA. And while the *Needham* court stated that "both the regulatory and plain meaning of 'adjacent' mandate a significant measure of proximity," *id.* at 347 n.12, and that "the term 'adjacent' cannot include every possible source of water that eventually flows into a navigable-in-fact waterway," *id.* at 347, the court did not offer a precise rule for determining when a nonnavigable tributary is "adjacent" to a traditional navigable water. Thus, even assuming that the Fifth Circuit follows the *Needham* dictum in a future case where the issue is actually presented, it is unclear to what extent the approaches taken by the Sixth and Fifth Circuits would lead to different results in concrete factual settings.

It should also be noted that the Fifth Circuit in *Needham* sustained the application of the OPA to the defendants' conduct based on the ultimate downstream presence of oil in Bayou Folse. See 354 F.3d at 346-347; p. 20, *supra*. The court did not examine whether the drainage ditch (the site of the original discharge) or Bayou Cutoff (the body of water into which the ditch directly flowed) was itself "adjacent" (as the court understood that term) to any traditional navigable water. Rather, the court framed the relevant question as "whether Bayou Folse, the site of the farthest traverse of the spill," satisfied the court's adjacency requirement. *Id.* at 346.

Thus, where it can be shown that an oil discharge has actual downstream effects, the Fifth Circuit (correctly) regards the OPA as applicable even if the first water body into which oil is discharged does not meet the court's standard for being "actually navigable or * * *

adjacent to an open body of navigable water." *Rice*, 250 F.3d at 269. The Fifth Circuit may also decide, in an appropriate future case, that an upstream discharge is covered by the OPA where the downstream effects of an oil discharge are potential rather than actual (*e.g.*, where remedial measures prevent discharged oil from reaching waters that the Fifth Circuit regards as "adjacent" to traditional navigable waters). The Fifth Circuit's willingness to consider the downstream effects of an oil discharge in determining the applicability of the OPA further diminishes the current practical significance of that court's dictum expressing apparent disagreement with the regulatory approach adopted by the government and sustained by the Sixth Circuit in this case.

3. In *SWANCC*, this Court found that application of the CWA to intrastate, nonnavigable, isolated waters, based on the presence of migratory birds, would raise serious constitutional questions. See *SWANCC*, 531 U.S. at 172-173. Petitioner contends (Pet. 19-24) that application of the CWA to the wetlands at issue here would raise similar constitutional concerns. Every court of appeals that has addressed the question, however, has held that the CWA may constitutionally be applied to nonnavigable tributaries and their adjacent wetlands.[5] Petitioner's constitutional challenge lacks merit and does not warrant this Court's review.

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[5] See, *e.g.*, *United States* v. *Pozsgai*, 999 F.2d 719, 733-734 (3d Cir. 1993), cert. denied, 510 U.S. 1110 (1994); *United States* v. *Hartsell*, 127 F.3d 343, 348-349 (4th Cir. 1997); *United States* v. *Tull*, 769 F.2d 182, 185 (4th Cir. 1985), rev'd on other grounds, 481 U.S. 412 (1987); *United States* v. *Ashland Oil & Transp. Co.*, 504 F.2d 1317, 1325-1329 (6th Cir. 1974); *United States* v. *Byrd*, 609 F.2d 1204, 1209-1210 (7th Cir. 1979). See also *Hodel* v. *Virginia Surface Mining & Recl. Ass'n*, 452 U.S. 264, 282, n.21 (1981) (citing

a. Contrary to petitioner's contention (Pet. 19), the assertion of federal regulatory authority over petitioner's wetlands is faithful to this Court's holding in *SWANCC* that "the word 'navigable' must inform the government's interpretation of the jurisdictional reach of the Clean Water Act." The isolated waters at issue in *SWANCC* had no hydrological connection, and the asserted basis for CWA jurisdiction bore no relation, to traditional navigable waters. By contrast, the wetlands at issue here have an established surface water connection to the Kawkawlin River, and ultimately to Lake Huron. Because the Corps' exercise of regulatory authority over petitioner's discharges serves the quintessential federal goal of protecting and enhancing water quality in traditional navigable waters, this case implicates core federal interests that were not present in *SWANCC*. See p. 12, *supra*. Congress's "power over navigable waters is an aspect of the authority to regulate the channels of interstate commerce," *Deaton*, 332 F.3d at 706—the first of the three categories of permissible Commerce Clause legislation identified by this Court in *United States* v. *Lopez*, 514 U.S. 549, 558-559 (1995)—and that power "carries with it the authority to regulate nonnavigable waters when that regulation is necessary to achieve Congressional goals in protecting navigable waters," *Deaton*, 332 F.3d at 707.

Riverside Bayview squarely held that the Corps and EPA may assert regulatory authority over at least *some* wetlands and other waters that do not themselves

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favorably to *Ashland Oil* and *Byrd* and agreeing that "the power conferred by the Commerce Clause [is] broad enough to permit congressional regulation of [intrastate] activities causing air or water pollution, or other environmental hazards that may have effects in more than one state").

meet traditional tests of navigability, based on their hydrological connections to traditional navigable waters. See 474 U.S. at 133.[6] And while *Riverside Bayview* did not involve a Commerce Clause challenge to the Corps' regulation, petitioner does not question Congress's constitutional authority to regulate pollutant discharges into wetlands that directly abut traditional navigable waters. See Pet. 21 (arguing that the Court should "limit[] the scope of the Clean Water Act to navigable waters and wetlands adjacent to such waters"). Once it is accepted that Congress can protect *some* intrastate waters (including wetlands) that do not themselves satisfy traditional standards of navigability, based on the danger that discharges into those waters may impair the quality of traditional navigable waters downstream, there is no reason that the scope of Congress's *constitutional* authority should depend on the distance between the regulated discharge and the nearest traditional navigable water, or on the number of

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[6] The courts have long recognized that pollution and environmental degradation in the nonnavigable portion of a tributary system can be expected, as a general matter, to have an adverse effect on water quality in the traditional navigable waters to which those tributaries lead. As the Sixth Circuit explained 30 years ago:

> It would, of course, make a mockery of [Congress's Commerce Clause] powers if its authority to control pollution was limited to the bed of the navigable stream itself. The tributaries which join to form the river could then be used as open sewers as far as federal regulation was concerned. The navigable part of the river could become a mere conduit for upstream waste.
>
> Such a situation would have vast impact on interstate commerce.

United States v. *Ashland Oil & Transp. Co.*, 504 F.2d 1317, 1326 (6th Cir. 1974).

"links" in the surface water connection between the two.

b. Petitioner contends (Pet. 22-24) that, if the CWA is construed to cover the discharges at issue here, the Act intrudes unduly into state land-use regulation and thereby upsets the federal-state balance. Petitioner's assertion (Pet. 24) that the Corps and EPA have engaged in "all-encompassing federal regulation of intrastate waters" is baseless. Even with respect to those waters that are encompassed by the regulatory definition of "waters of the United States," the only activity that requires a CWA permit is the discharge of a pollutant from a point source.[7] Other functions and activities relating to land use remain in the hands of the local authorities. In addition, the CWA provides States the opportunity to assume responsibility for the administration of the Section 404 permitting program. See p. 4, *supra*. Because the State of Michigan has an approved permitting program covering the waters at issue here, state rather than federal regulators would have acted on any permit application that petitioner submitted. Petitioner's claim of unconstitutional intrusion on state regulatory authority is therefore particularly unavailing under the circumstances of this case.

In any event, the federal government possesses longstanding authority to protect the quality of traditional navigable waters by regulating upstream pollutant dis-

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[7] Moreover, once the Corps or EPA has issued its final decision on a CWA permit application, that decision is subject to judicial review under the Administrative Procedure Act, 5 U.S.C. 701 *et seq*. Thus, even with respect to development activities that involve pollutant discharges into "the waters of the United States," petitioner's suggestion (Pet. 22) that the CWA gives federal regulators an "actual veto power" over those projects is considerably overstated.

charges. See p. 12, *supra*. As cases like *Riverside Bayview* make clear, the exercise of that authority may as a practical matter affect activities (*e.g.*, residential housing development, see *Riverside Bayview*, 474 U.S. at 124) that are also subject to extensive state regulation. See *Deaton*, 332 F.3d at 707 ("The power to protect navigable waters is part of the commerce power given to Congress by the Constitution, and this power exists alongside the states' traditional police powers."). So long as the assertion of federal regulatory authority in this case was an otherwise permissible use of the power to protect traditional navigable waters, the requirement that petitioner seek a CWA permit for his fill activities does not impermissibly encroach on state and local land-use planning. See *id.* at 707-708.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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